

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Declaratory Ruling that USA)	WC Docket No. 05-276
Datanet Corp. Is Liable for Originating)	
Interstate Access Charges When It Uses)	
Feature group A Dialing to Originate Long)	
Distance Calls)	

COMMENTS OF AT&T INC.

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I. INTRODUCTION AND SUMMARY

AT&T Inc. and its affiliates (collectively, AT&T)¹ respectfully submit the following comments in support of the above-captioned petition for declaratory ruling filed by Frontier Telephone of Rochester, Inc. (Frontier).² The Commission is often confronted with complicated petitions raising novel legal, technical and economic issues that require it to make difficult policy choices. Frontier's petition, however, is not one of them. To the contrary, Frontier straightforwardly alleges that an interexchange carrier, USA Datanet Corp. (Datanet), is using Frontier's local telephone network to originate ordinary long distance calls without paying Frontier the requisite access charges for this use of its network. Pursuant to the plain language of section 69.5(b) of the Commission's well-established access charge rules, Datanet is obligated to pay access charges to Frontier for originating these calls.

Indeed, even Datanet does not contest the fact that section 69.5(b), on its face, requires it to pay access charges to Frontier. Instead, Datanet appears to rely on two highly dubious arguments for its refusal to pay the access charges it owes to Frontier.

First, Datanet asserts that it did not "order" access service directly from Frontier's access tariff; rather, Datanet relies on a CLEC known as Paetec to provide connectivity between Datanet and Frontier. As AT&T has previously explained in this docket, however, the Commission's long-standing "constructive ordering doctrine" obligates Datanet to pay access charges to Frontier where, as here, Datanet is interconnected with other carriers in such a manner

¹ On November 18, 2005, SBC Communications Inc. closed on its merger with AT&T Corp. The resulting company is now known as AT&T Inc. Thus, in these comments "AT&T" refers to the merged company, including its ILEC operating subsidiaries, unless otherwise noted.

² Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling that USA Datanet Corp. Is Liable for Originating Interstate Access Charges When It Uses Feature Group A Dialing to Originate Long Distance Calls, WC Docket No. 05-276 (Nov. 22, 2005) (Frontier Petition).

that it can expect to receive access services, it fails to take reasonable steps to prevent the receipt of access services, and it does in fact receive such services.

Second, Datanet claims that, although it uses IP-in-the-middle technology to transport ordinary long distance calls between points of origination and termination on the public switched telephone network (PSTN), it is not subject to the Commission's *IP-in-the-Middle Order*, which held that access charges apply to IP-in-the-middle long distance calls.³ According to Datanet, that *Order* was limited to "1+" dialed calls and does not cover calls that are made with the extended Feature Group A dialing pattern used by Datanet for its IP-in-the-middle long distance service. Contrary to Datanet's claims, however, the *IP-in-the-Middle Order* applies to *all* IP-in-the-middle long distance services, including Datanet's service, that use ordinary customer premises equipment (CPE) with no enhanced functionality; originate and terminate on the PSTN; and undergo no net protocol conversion and provide no enhanced functionality to end users. Moreover, even if the *IP-in-the-Middle Order* were limited to 1+ dialed calls (and it is not), Datanet would still be liable for access charges under the plain language of section 69.5(b) of the Commission's rules.

Datanet's utter disregard for its access charge obligations would be disturbing enough if this was merely an isolated case of unlawful access charge evasion by a single carrier. But as AT&T has shown with its own petition in this docket, Datanet is just one of many IP-in-the-middle carriers that continue to blatantly ignore the Commission's access charge rules.⁴ The Commission must put a stop to this illegal behavior by granting the AT&T and Frontier petitions

³ *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 (released April 21, 2004) (*IP-in-the-Middle Order*).

⁴ *Petition of the SBC ILECs for a Declaratory Ruling That Unipoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges*, WC Docket No. 05-276 (Sept. 19, 2005) (*IP-in-the-Middle Enforcement Petition*); *Reply Comments of AT&T Inc.*, WC Docket No. 05-276 (Dec. 12, 2005) (*AT&T December 12 Reply Comments*).

and sending a strong message that such flagrant violations of the Commission's rules will not be tolerated. If the Commission fails to do so in a timely fashion, it will leave legitimate carriers no choice but to exercise whatever lawful self-help measures they deem necessary to stop this brazen access charge evasion.

II. DISCUSSION

A. Datanet Provides Ordinary Long Distance Service and Is Obligated to Pay Originating Access Charges Under Well-Established Commission Rules.

In response to Frontier's petition, Datanet told this Commission that it is a "provider of Internet Protocol ('IP') enabled services, which are commonly referred to as Voice over Internet Protocol ('VoIP') services"⁵ Datanet's claim is, at best, a half-truth. While Datanet does offer a broadband-originated IP-based voice service,⁶ Datanet knows quite well that its broadband-originated service is *not* at issue in Frontier's petition. Rather, Frontier's petition concerns the traditional long distance services offered by Datanet, which both originate and terminate on the PSTN.⁷ And, try as it might, Datanet cannot escape the fact that it *does* provide ordinary long distance service, which it prominently advertises on its website.⁸ This long distance service offered by Datanet bears none of the characteristics that the Commission has found relevant in identifying a VoIP service: Datanet's long distance service does not require a broadband connection; it does not require IP-compatible CPE; and it does not provide any enhanced features or functionality to Datanet's subscribers.⁹ In short, the Datanet service at

⁵ USA Datanet Corp. Opposition and Motion to Dismiss, WC Docket No. 05-276, at 4 (Dec. 6, 2005) (Datanet Motion to Dismiss).

⁶ See USA Datanet All Talk Broadband Phone Services, at <http://www.usadatanet.com/broadband/> ("In order to use the All Talk Plan, you must have a high-speed Broadband Internet connection to your computer from a provider other than USA Datanet, it will not work with any dial-up Internet service.").

⁷ Frontier Petition at 2.

⁸ See USA Datanet Phone Services: Long Distance, at <http://www.usadatanet.com/longDistance.html>.

⁹ See *IP-in-the-Middle Order* ¶ 1; *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 ¶ 32 (released Nov. 12, 2004).

issue here is nothing more than plain old long distance service, which Datanet happens to transport in IP format between the points of origination and termination on the PSTN.¹⁰

In fact, the long distance service offered by Datanet is *less* advanced than the typical long distance services offered by other interexchange carriers. Most interexchange carriers offer long distance service today using Feature Group D access service purchased from the originating local exchange carrier serving their long distance customers. Among other things, Feature Group D enables the interexchange carrier's customers to presubscribe to the carrier's long distance service and affords those customers the ability to make long distance calls by dialing "1" plus the called party's telephone number (so-called "1+" dialing). Datanet, however, requires its customers to use a more primitive long distance dialing arrangement based on Feature Group A access service.¹¹ With the long distance service offered by Datanet, a customer must first dial a seven-digit local access telephone number, enter an authorization code (if prompted), and then dial the area code and seven-digit telephone number of the called party.¹² Given the availability of Feature Group D, the convenience of 1+ dialing, and the fact that Frontier charges the *same* access rates for both Feature Group A and Feature Group D, Datanet's use of Feature Group A

¹⁰ See *IP-in-the-Middle Order* ¶¶ 12-13.

¹¹ See Frontier Petition at 5 (Feature Group A "was the only option available to competitive long distance carriers before the advent of equal access.").

¹² USA Datanet Phone Services: Long Distance, How to Place a Call with USA Datanet, at <http://www.usadatanet.com/longDistance.html>. See *Transport Rate Structure and Pricing*, CC Docket No. 91-213, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370 ¶ 15 (1993) (*Transport Rate Structure and Pricing Order*) ("Feature Group A is similar to local exchange service, but is used to provide interstate access. IXC's use Feature Group A as a form of switched access to originate and terminate calls by their end user customers. In such circumstances, the end user dials a seven digit number to reach the LEC's 'dial tone office' serving the IXC, where the LEC switches the call to the IXC's POP via a dedicated loop-side connection. In many cases, the dial tone office is the [serving wire center]; in some cases, dial tone is provided from a different office, in which case there will be a separate [serving wire center] between the dial tone office and the POP.").

begs the question of why it would force its customers to jump through so many extra hoops to make a long distance call.¹³ The answer is simple: access charge evasion.

Under section 69.5(b) of the Commission's rules, access charges "shall be assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."¹⁴ In most cases, the application of this rule in practice is straightforward. The interexchange carrier orders access service from the originating LEC's tariff and pays the LEC the applicable access charges for each call made using that service.

Datanet, however, has devised a scheme to avoid paying access charges to Frontier, and presumably other originating LECs, by unlawfully exploiting the manner in which Feature Group A access service is provisioned. Rather than purchasing Feature Group A from Frontier, Datanet purchases the service from Paetec, which supplies the seven-digit local access number that Datanet's customers dial to begin making a long distance call. When a Datanet customer with local exchange service from Frontier (or presumably any other LEC) calls the seven-digit local access number, the call appears to Frontier as a *local* call, not a long distance call. Indeed, as the Commission has recognized, although Feature Group A is used to provide access service, "Feature Group A calls cannot be distinguished from local calls placed to the dial tone office" because of the "inability of most LEC end office switches to differentiate between originating Feature Group A traffic and local traffic."¹⁵ Thus, rather than receiving originating access

¹³ See Frontier Petition at 5-6 ("Feature Group D 1+ equal access dialing is far more convenient to end users and provides a technically better quality of service than the line-side Feature Group A connection. A Feature Group A connection is more subject than Feature Group D service to echoing and other service quality issues.").

¹⁴ 47 C.F.R. § 69.5(b).

¹⁵ *AT&T Communications Tariff Nos. 9 and 11*, CC Docket No. 94-120, Memorandum Opinion and Order, 10 FCC Rcd 4288 ¶ 4 (1995); *Transport Rate Structure and Pricing Order* ¶ 16.

charges from Datanet, the originating LEC would presumably *pay* reciprocal compensation to Paetec – even though Datanet is unquestionably using the LEC’s local exchange switching facilities for the origination of an interexchange telecommunications service. Such a result turns the Commission’s access charges rules on their head and creates an unlawful windfall for Datanet and Paetec.¹⁶

Of course, Datanet and/or Paetec could have forthrightly informed Frontier of the manner in which they were using Feature Group A access service and they could have established an arrangement to ensure that Frontier was appropriately compensated for the access services it provided. But doing so would have eliminated the unlawful cost advantage Datanet obtained from its access evasion scheme. Instead, Frontier apparently uncovered Datanet’s scheme on its own and began billing Datanet for the originating access services Frontier had been providing.¹⁷ Datanet refused to pay, which led to litigation between the parties and, ultimately, the instant petition for declaratory ruling.¹⁸

Despite Datanet’s extensive efforts to avoid paying the access charges it owes for the access services it received from Frontier, the simple fact remains that Datanet is an interexchange carrier providing ordinary long distance telecommunications service using

¹⁶ See Frontier Petition at 3 (“It is Frontier’s understanding that Paetec does not actually bill its share of originating access charges to Datanet, but instead that the two carriers have some kind of contractual arrangement.”).

¹⁷ Frontier Petition at 3, 8 n.11.

¹⁸ After Frontier filed its petition, Datanet asked the Commission to dismiss that petition without consideration. Datanet Motion to Dismiss at 12. In support of its motion, Datanet offers a variety of dubious procedural arguments related to the underlying litigation with Frontier. But Datanet completely ignores section 1.2 of the Commission’s rules, under which the Commission has broad authority to “issue a declaratory ruling terminating a controversy or removing uncertainty,” regardless of any litigation between the parties. 47 C.F.R. § 1.2 The Commission should exercise that authority here and should put to rest the controversy that Datanet itself has created by failing to pay access charges in violation of the Commission’s access charge rules. Such a ruling is particularly appropriate in this case, where the court in the underlying litigation between Frontier and Datanet “agrees that the doctrine of primary jurisdiction applies” and has expressly stayed the litigation until this Commission resolves the issue of whether Datanet and similar providers “are liable for access charges.” *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F.Supp.2d 144, 149, 151 (W.D. NY 2005).

Frontier's local exchange switching facilities. Pursuant to the plain language of section 69.5(b) of the Commission's rules, Datanet owes access charges to Frontier.

B. Datanet Cannot Avoid its Obligation to Pay Access Charges by Claiming that It Did Not “Order” Access Service from Frontier’s Tariff.

Datanet has argued that it cannot be held liable for paying access charges to Frontier because it did not order Feature Group A access service from Frontier's tariff; rather, Datanet purchased Feature Group A from Paetec.¹⁹ Datanet acknowledges, however, that under the Commission's “constructive ordering doctrine” a party can, in fact, be held liable for access charges even though it does not order access service directly from a LEC tariff.²⁰ Indeed, as AT&T explained at length in support of its IP-in-the-Middle Enforcement Petition, a carrier is subject to access charges if the carrier: (1) is interconnected with other carriers in such a manner that it can expect to receive access services; (2) fails to take reasonable steps to prevent the receipt of access services; and (3) does in fact receive such services.²¹ All three of these conditions are satisfied here.

First, Datanet is interconnected with Paetec (directly) and Frontier (indirectly through Paetec) for the express purpose of receiving access services from Frontier. Indeed, the whole point of Datanet's arrangement with Paetec is to obtain local access telephone numbers so that Datanet can offer its long distance service to Frontier's local exchange service customers (and

¹⁹ Frontier Petition at Exhibit C, Defendant's Memorandum of Law in Support of its Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction and for Failure to State a Claims Upon Which Relief Can Be Granted at 22-24, Attachment to Memorandum of Law – White Declaration at 3-7.

²⁰ Frontier Petition at Exhibit C, Defendant's Memorandum of Law in Support of its Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction and for Failure to State a Claims Upon Which Relief Can Be Granted at 22-23.

²¹ IP-in-the-Middle Enforcement Petition at 32-33; AT&T December 12 Reply Comments at 22-24. *See Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 ¶ 188 (1999).

presumably customers of other LECs).²² In order to provide long distance service to Frontier's customers, Datanet must use Frontier's local exchange switching facilities to originate long distance calls from those customers. Thus, not only did Datanet "expect to receive access services" from Frontier, but Datanet's entire long distance business model is predicated on receiving such access services.²³

Second, far from taking reasonable steps to prevent the receipt of access services, Datanet has gone to great lengths to receive such services without Frontier's knowledge. The Feature Group A arrangement that Datanet has constructed with Paetec is designed so the originating LEC (Frontier) would not ordinarily recognize that Datanet is obtaining access services. Specifically, because Datanet requires its customers to dial a local access telephone number to use its long distance service, Frontier (or any other LEC) would not normally have any reason to know that Datanet was, in reality, using Frontier's local exchange switching facilities for the origination of long distance traffic. Such actions by Datanet cannot plausibly be deemed "reasonable steps to prevent the receipt of access services."

Third, despite its protestations to the contrary, Datanet does in fact receive access services from Frontier. Indeed, it is undisputed that the interexchange calls at issue here originate over the local exchange switching facilities of Frontier within the meaning of section 69.5(b) of the Commission's rules, even though Datanet does not pick them up directly from

²² Frontier Petition at Exhibit C, Defendant's Memorandum of Law in Support of its Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction and for Failure to State a Claims Upon Which Relief Can Be Granted at 22-24.

²³ Datanet claims that the first prong of the constructive ordering doctrine has not been satisfied because it does not interconnect "directly" with Frontier. Frontier Petition at Exhibit C, Defendant's Memorandum of Law in Support of its Motion to Dismiss Based Upon the Doctrine of Primary Jurisdiction and for Failure to State a Claims Upon Which Relief Can Be Granted at 23. But there is no such requirement for "direct interconnection" in the constructive ordering doctrine. Instead, a carrier need only be "*interconnected with other carriers* in such a manner that it can expect to receive access services" for the first prong of the doctrine to be satisfied. *See Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 ¶ 188 (1999) (emphasis added). *See also* SBC IP-in-the-Middle Enforcement Petition at 32-33; AT&T December 12 Reply Comments at 22-24.

Frontier but instead relies on Paetec for that purpose.²⁴ Accordingly, all elements of the constructive ordering doctrine are satisfied and Datanet is obligated to pay Frontier for the access charges it has unlawfully avoided.

C. Datanet Cannot Avoid its Obligation to Pay Access Charges by Claiming that the *IP-in-the-Middle Order* Is Limited to “1+” Calls.

In a last-gasp effort to evade its access charge obligations, Datanet seeks to distance itself from the Commission’s *IP-in-the-Middle Order*. In that *Order*, the Commission held that the IP-in-the-middle long distance services offered by AT&T were not enhanced services, but were actually nothing more than ordinary long distance services subject to access charges. Datanet contends, however, that the *IP-in-the-Middle Order* was limited to 1+ dialed calls and does not cover IP-in-the-middle calls that are made with the extended Feature Group A dialing pattern used by Datanet for its long distance service.²⁵ According to Datanet’s logic, notwithstanding the fact that the Commission held that IP-in-the-middle long distance calls using Feature Group D 1+ dialing are telecommunications services subject to access charges, the Commission could, in theory, subsequently decide that the exact same IP-in-the-middle long distance calls using Feature Group A extended dialing are enhanced services exempt from access charges. Datanet’s argument is nothing more than wishful thinking.

First, the *IP-in-the-Middle Order* was not limited solely to 1+ dialed calls. The Commission expressly stated that its *Order* covered any interexchange service that: “(1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol

²⁴ See AT&T December 12 Reply Comments at 28-30.

²⁵ See *Frontier Telephone of Rochester, Inc. v. USA Datanet Corp.*, 386 F.Supp.2d 144, 148 (W.D. NY 2005) (“Datanet maintains, however, that the [*IP-in-the-Middle Order*] does not apply to its phone service Datanet contends that its customers do not use true “1+” calling, but instead use a different type of dialing that involves dialing a seven-digit local number, entering a PIN number, and then dialing the actual number to be called.”).

conversion and provides no enhanced functionality to end users due to the provider's use of IP technology."²⁶ To be sure, the Commission pointed out that AT&T happened to use Feature D 1+ dialing to originate its IP-in-the-middle calls.²⁷ But the Commission did not suggest that 1+ dialing was relevant to, let alone dispositive of, whether an IP-in-the-middle long distance service is a telecommunications service subject to access charges. Indeed, the Commission issued the *IP-in-the-Middle Order* to eliminate "arbitrage" and to remedy the competitive disparity in the industry whereby "some carriers may be paying access charges for [IP-in-the-middle] services while others are not."²⁸ It would completely undermine the purpose of that *Order* to now strictly limit its applicability to 1+ dialed calls as Datanet suggests. Moreover, it would create massive new arbitrage opportunities for interexchange carriers like Datanet – not because of any enhanced features or functionalities provided to their customers – but solely because their customers are required to dial extra digits when making a long distance call. Accordingly, rather than limiting the *IP-in-the-Middle Order* to 1+ dialed calls, the Commission should confirm that the *Order* applies with equal weight to the Feature Group A long distance service offered by Datanet.

Second, even if the *IP-in-the-Middle Order* were limited to 1+ dialed calls as Datanet claims (and it is not), Datanet would still be required to pay access charges under the plain language of the Commission's access charge rules. In the *Order*, the Commission clarified the applicability of section 69.5(b) of its rules; it did not amend or otherwise modify section 69.5(b)

²⁶ *IP-in-the-Middle Order* ¶ 1. As discussed above in section II.A, Datanet's long distance service meets each of these criteria and is thus subject to access charges.

²⁷ *IP-in-the-Middle Order* ¶¶ 11, 15, 18. In a footnote, the Commission stated that "VoIP services" that do not use 1+ dialing were beyond the scope of its *Order*. *IP-in-the-Middle Order* ¶ 13 n.58. But as discussed above in section II.A., Datanet's long distance service is an ordinary long distance telecommunications service and does not have any of the characteristics that the Commission has found relevant in identifying a VoIP service.

²⁸ *IP-in-the-Middle Order* ¶¶ 17, 19.

or any of its other access charge rules. Thus, regardless of whether the *Order* specifically addressed the type of Feature Group A IP-in-the-middle long distance service provided by Datatnet, that service is still subject to access charges under the plain language of section 69.5(b) for all of the reasons discussed above.

III. CONCLUSION

The petitions filed by AT&T and Frontier in this docket should serve as a blaring wake-up call for the Commission that, almost two years after the it issued the *IP-in-the-Middle Order*, some IP-in-the-middle providers and their CLEC partners are continuing to make a mockery of the Commission's access charge rules. If the Commission does not bring these recalcitrant providers to heel by granting the AT&T and Frontier petitions, it will leave legitimate carriers no choice but to take matters into their own hands by exercising whatever lawful self-help remedies are necessary to prevent this illegal and ongoing access charge evasion. Accordingly, the Commission should immediately grant the petitions by AT&T and Frontier and broadly declare – once and for all – that access charges apply to IP-in-the-middle long distance calls.

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